2008

The State of Utah v. Jose Baltarcar Roybal : Brief of Respondent

Utah Supreme Court

CASE NUMBER: 20080776-SC

In the
Utah Supreme Court

State of Utah,
Plaintiff/Petitioner,

v.

Jose Baltarcar Roybal,
Defendant/Respondent.

Brief of Respondent

THIS APPEAL IS FROM A CONDITIONAL PLEA AND SUBSEQUENT SENTENCING TO ONE COUNT OF DUI, A THIRD DEGREE FELONY AND WAS SENTENCED TO FORMAL PROBATION FOR THIRTY-SIX MONTHS, IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE PARLEY R. BALDWIN PRESIDING.

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STATEMENT OF JURISDICTION

On July 25, 2008, the Utah Court of Appeals issued its ruling in this case. That ruling is published as *State v. Roybal*, 2008 UT App 286, 191 P.3d 822. On November 25, 2008, the Court granted the State's petition for a writ of certiorari. This Court has jurisdiction under Utah Code Annotated §78A-3-102(3)(a).

STATEMENT OF ISSUES

Defendant's girlfriend called 911 to report a domestic disturbance. She told the dispatcher that the Defendant had left the premise in his car and that he had "just about" assaulted her. Defendant's girlfriend identified herself and the Defendant by name, and said Defendant had been drinking, but gave no further

information. When an officer spotted the Defendant in the area, the Defendant was driving slowly, but violating no traffic laws. The Court of Appeals held that the officer did not have reasonable suspicion to conduct an investigatory stop.

Issue I: Was the Court of Appeals correct in concluding that there was no reasonable suspicion that the Defendant had committed domestic violence, where the only information given to a 911 dispatcher was that the Defendant had "just about" assaulted her?

Issue II: Was the Court of Appeals correct when it analyzed the 911 call separately from the officer's observations when conducting its reasonable suspicion analysis? In addition, was the Court of Appeals correct when it concluded that there was no reasonable suspicion that the Defendant was driving while intoxicated?

STANDARD OF REVIEW

"On certiorari, we review the decision of the Court of Appeals and not that of the district court. The Court of Appeals' decision is reviewed for correctness. In search and seizure cases, no deference is granted to either the court of appeals or the district court regarding the application of law to underlying factual findings." *State v. Alvarez,* 2006 UT 61, ¶ 8, 147 P.3d 425 (quotations and citation omitted).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

UNITED STATES CONSTITUTION

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UTAH STATE CONSTITUTION

Article I, Section 14. [Unreasonable searches forbidden -- Issuance of warrant.]

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

UTAH CODE ANNOTATED

77-7-16. Authority of peace officer to frisk suspect for dangerous weapon -- Grounds.

A peace officer who has stopped a person temporarily for questioning may frisk the person for a dangerous weapon if he reasonably believes he or any other person is in danger.

§78A-3-102. Supreme Court jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) a judgment of the Court of Appeals;

STATEMENT OF THE CASE

FACTS

On August 8, 2005, Annalee McCain called 911 and told the dispatcher that she had a dispute with her live-in boyfriend. R. 96:1. Annalee told the dispatcher that "the person that's been living with me is an a----- and I want him the f--- out of here." R. 96: 1. When the dispatcher asked her whether she had been assaulted, Annalee responded "just about yes," but then further affirmed that her boyfriend had not actually assaulted her. R: 96:2 When questioned, "And he hasn't assaulted you?" Annalee's response was "No."

The dispatcher had asked Annalee whether her boyfriend "had been drinking?" R. 96:2, and Annalee replied: "We both have. And you might have to take both of. I don't even give a s---, I just want him out." R. 96:2. Annalee was excited and angered. The dispatcher then attempted to calm Annalee down, telling her to "take a couple of deep breaths." R. 96: 2. The trial court later stated that Annalee sounded intoxicated during the call. R. 95:24.

Annalee gave the dispatcher her name and address. R. 96:1. She identified the Defendant as her boyfriend and gave the dispatcher Defendant's name, age, and ethnicity. R. 96:2-3. Annalee told the dispatcher that Defendant was no longer in the house and that he was "putting stuff in his van" and was "leaving." R. 96: 2-3. Annalee then explained the vehicle the Defendant was getting into and gave

only a partial license plate number. R. 96: 3-4. She then told the dispatcher what road Defendant was traveling on. R. 96:3. No further inquiries about the amount of alcohol consumed or other details were requested.

The 911 dispatcher sent out a bulletin requesting the assistance of officers. R. 54. Sergeant Chad Ledford responded. R. 54. The 911 dispatcher informed him that a "male and female were verbally fighting, no weapons, both parties very intoxicated." R. 54. The dispatcher identified Defendant and gave the make and color of his vehicle, as well as Defendant's direction of travel. R. 54. The dispatcher then indicated that Defendant was "1055," police code for intoxicated driver. R. 54, 97:4.

After receiving the 911 dispatch, Sergeant Ledford was traveling eastbound on 30th Street, towards Annalee's residence[1]. R. 97:5. As Sergeant Ledford passed Brinker Ave., he noticed Defendant's van approached the stop sign at Brinker and 30th. R. 97:5. Although there was no oncoming traffic, Defendant sat there for "a few seconds" before turning right onto 30th, but was violating no traffic laws. R. 97:7. When Defendant turned the corner and started coming towards Sergeant

[1] The State has included a Google map of the area and asks that this Court take judicial notice of that information. The Defendant stipulates to the judicial notice nature of the map. It is interesting to note that the officer is, however, mistaken as to directions based on the map. The officer stated that he was traveling eastbound on 30th street toward Annalee's residence when he saw the Defendant at the intersection of Brinker and 30th. If this was the case, he would have been traveling away from Annalee's residence which was five blocks west of Brinker.

Ledford, he was traveling at about 5 – 25 mph in a 35 mph zone. R. 95: 3: 97:6. Sergeant Ledford was stopped at the stop light at the intersection of 30th and Harrison Blvd. and watched as Defendant approached him from the rear. R. 97: 5-6. It appeared to Sergeant Ledford that Defendant was "hoping the red light would change." R. 97:7. The Defendant pulled up next to Sergeant Ledford, stopped at the red light, and sat at the red light. R. 97:6. Defendant made a right turn onto Harrison Blvd. R. 97:6. Sergeant Ledford followed. R. 95:12.

The speed limit on Harrison Boulevard was 40 mph, but Defendant was traveling slower. R. 95:3; 97:6. Defendant then turned onto Patterson Avenue. R. 97:6. Sergeant Ledford thought it looked as if Defendant was trying to avoid him. R. 97:7. Sergeant Ledford could not testify as to the speed limit on Patterson, nor the mph that Defendant was driving. Sergeant Ledford only said the speed was "a little slow" or "a little odd." R. 95:3, 14.

Sergeant Ledford stated that his experience shows that individuals who have been drinking their fine motor skills are affected so overall movements are slower and they may try to avoid police cars. R. 97:10. Sergeant Ledford suspected Defendant was impaired because he had observed the Defendant driving "a little slow," and Defendant did not try to drive next to Sergeant Ledford. R. 97:9.

Sergeant Ledford also suspected that Defendant had committed domestic violence. R. 95:14-16. From the dispatch report, Sergeant Ledford knew there had

been a domestic dispute. R. 97:2. Sergeant Ledford stated that it is "normal behavior for people involved in those types of relationships to argue." R. 97:14. As a result, department policy required Sergeant Ledford to interview both the victim and suspect on any domestic violence call. R. 97:2-3.

Sergeant Ledford pulled Defendant over on the 1100 block of Patterson[2]. R. 95:2. Sergeant Ledford's primary reason for stopping Defendant was to investigate the domestic dispute. R. 97:17-18. Only later did Sergeant Ledford state he stopped the Defendant to investigate him for a DUI. R. 97: 21-22. After Defendant failed field-sobriety tests, he was arrested for DUI. R. 95:4-9.

Trial Court Proceedings

On August 29, 2005, Defendant was charged with one count of DUI and one count of violating a no alcohol conditional license. R. 1. Defendant filed a motion to suppress all evidence derived from the stop, arguing that the stop was not supported by reasonable suspicion that he had committed any crime. R. 23-24.

The trial court denied Defendant's motion. R. 56-59. In the court's oral ruling, the court concluded that the stop was justified because the 911 dispatcher had reasonable suspicion that Defendant was driving while under the influence of

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[2] It is also interesting to note that Sgt. Ledford claimed the defendant had been driving in a slow, circuitous pattern in the vicinity of Annalee's residence.(R. 97: 8-9) The fact of the matter is that the distance between the residence of 3865 Quincy to the 1100 block of Patterson is over 12 block, or one and one half miles away. (See map with locations marked addendum A)

alcohol. R. 95:23-25. As a result, the court did not decide whether there was reasonable suspicion of a DUI based on the officer's own observations of Defendant's driving behavior, or whether Sergeant Ledford had reasonable suspicion that Defendant had committed domestic violence.

On July 19, 2006, Defendant entered a conditional guilty plea to one count of driving under the influence of alcohol, a third degree felony, preserving his right to appeal the district court's ruling. R. 66-67. Defendant was sentenced on October 5, 2006, and timely appealed. R. 85-87.

Court of Appeals Ruling

On July 25, 2008, the Court of Appeals reversed *State v. Roybal*, 2008 UT App 286, 191 P.3d 822. The Court first held that Annalee McCaine's 911 call was less reliable because Annalee was Defendant's angered girlfriend. *Id.* The court held "when a citizen-informant has some kind of personal involvement with the suspect, the information conveyed is considered less reliable because there is a possibility that the citizen is making allegations out of anger, jealousy, or for other personal reasons." *Id.* at ¶ 11.

The Court held that Sergeant Ledford did not have reasonable suspicion that Defendant was driving while intoxicated. *Id* at ¶ 14-16. Defendant's girlfriend was extremely upset with Defendant as expressed by her words to the 911 dispatcher, the girlfriend never told the 911 dispatcher "the quantity or type of alcohol

[Defendant] consumed," "how long [Defendant] had been drinking," or Defendant's weight. *Id.* at ¶ 14.

The court also decided that Sergeant Ledford's observations alone did not justify the stop. *Id.* at ¶ 10. The court held that there was no "suggestion of criminality" because Defendant had not actually violated any traffic laws. *Id.* at ¶ 16.

The Court also held that Sergeant Ledford did not have reasonable suspicion that Defendant had committed domestic violence. The Court held that Annalee's call to 911 only described a "nonphysical confrontation" that could not support an investigatory stop. *Id.* at ¶ 17.

SUMMARY OF ARGUMENT

Point I: The Defendant submits that Sergeant Ledford did not have articulable reasonable suspicion to stop and seize the Defendant based upon the 911 call from Annalee. The Defendant recognizes the standard to be utilized in a stop and seizure is an objective review of the totality of the circumstances. The only evidence available for this review is the 911 tape where Annalee claimed that Roybal had "just about assaulted" her, but upon further inquiry verified that he had not in fact assaulted her. She also mentioned that Roybal had been drinking, but did not elaborate on what he had been drinking, how much, and in what time

period it had been consumed. There was also significant anger and rage on the part of Annalee during the call which would affect a reasonable person's reliance on that information. Taken at its best, the 911 call indicated a verbal argument, with no physical aspect, and an individual who was driving away after having consumed an uncertain amount of an unspecified beverage. There was no question that Annalee was not in danger since it was confirmed that Roybal had left the premises. Given the totality of the circumstances, the stop therefore violated the Defendant's Fourth Amendment constitutional rights.

Point II: Likewise, the Defendant does not believe that the State has established reasonable suspicion to stop Defendant based upon an unverifiable claim of driving while intoxicated. The Fourth Amendment protects citizens from unreasonable searches and seizures. In regards to traffic stops, this has been interpreted to require reasonable suspicion that the person being stopped has committed an offense. In the present case, Sergeant Ledford had no objective reasonable suspicion that the Defendant had committed any crime. In fact, the following of the Defendant for almost four blocks and viewing absolutely no driving violation should have dispelled suspicion in a reasonable objective mind. Given the totality of circumstances test, a reasonable objective officer would not have believed that there was suspicion that the Defendant had or was committing a crime. Furthermore, the officer could not have reasonably believed that the

Defendant was heading back to Annalee's home based upon objective facts that he had left the premises, that he was over 1 ½ miles away from the home, and that he was driving slowly and cautiously and therefore not in any kind of rage of anger. The seizure, therefore, constitutes a violation of the Defendant's Fourth Amendment constitutional rights.

ARGUMENT

A founding father of this great nation, Benjamin Franklin, poignantly stated, "Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety." *Historical Review of Pennsylvania, 1759.* It has long been valued and expressed in our Constitution through the Bill of Rights, that individuals are entitled to protections against their government. United States Constitution Art. I Sec. 14, Fourth Amendment; Utah Const. Art. I, §14. The cost of our independence was great; it did not come easily. As the Declaration of Independence states:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain **unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.** ... That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it... Prudence, indeed, will dictate that **Governments long established should not be changed for light and transient causes**..." Declaration of Independence, 1776. (emphasis added)

Abraham Lincoln, perhaps expressed it best in his address to the New Jersey State Senate on February 21, 1861. In speaking to the Senate he briefly recalled reading about George Washington's crossing of the ice-choked Delaware in the dead of winter during the Revolutionary war and then stated,

> I recollect thinking then, boy even though I was, that there must have been something more than common that those men struggled for; that something even more than National Independence; that something that held out a great promise to all the people of the world to all time to come; I am exceedingly anxious that this Union, the Constitution, and the liberties of the people shall be perpetuated in accordance with the original idea for which that struggle was made, and I shall be most happy indeed if I shall be an humble instrument in the hands of the Almighty, and of this, his almost chosen people, for perpetuating the object of that great struggle.

One of those liberties that President Lincoln so cherished was the Fourth Amendment right against unreasonable searches and seizures. As the Constitution provides, and as this Court further declared in *State v. Kohl*, 2000 UT 35, ¶ 10, 999 P.2d 7, "A stop is justified only if there is a reasonable suspicion that a person is involved in criminal activity." This court recognizing that an unjustified stop is a violation of a person's protected and essential right to liberty and freedom from illegal searches. *Id.*

It is important to uphold these rights our country was founded upon. Allowing individuals to be stopped without reliable information simply on an officer's unsupported suspicion violates the very right our Constitution was enacted to protect. The Utah Court of Appeals correctly concluded that Sergeant

Ledford did not have independent probable cause to suspect Defendant was driving intoxicated or that Defendant had been involved in a domestic dispute. *(Roybal).* Further, the Court of Appeals was correct in upholding a standard of reliable informants when the court held that allegations, as received from Defendant's girlfriend, who expressed angry language towards Defendant to the 911 dispatcher; and considering the nature of the situation, did not rise to a level of reasonable suspicion without further information. *State v. Roybal*, 2008 UT App 286 ¶11, 14., 191 P.3d 822 Although the Court of Appeals did not articulate the objective standard and the totality of circumstances, it is evident that their ruling was consistent with those rules.

ISSUE I.

THE COURT OF APPEALS WAS CORRECT IN CONCLUDING THAT THERE WAS NO REASONABLE SUSPICION THAT THE DEFENDANT HAD COMMITTED DOMESTIC VIOLENCE, WHERE THE ONLY INFORMATION GIVEN TO A 911 DISPATCHER WAS THAT THE DEFENDANT HAD "JUST ABOUT" ASSAULTED HER.

The State argues that the 911 call should have been presumed reliable for two reasons. First, the caller identified herself to the 911 dispatcher, and therefore should be presumed reliable. Second, it should be presumed reliable because it was a 911 emergency call. (Brief. Pet. pg 17) However, if accepted, these "rules" would result in an increase of unreliable informants and increased 911 calls that

were not substantiated by objective observances of officers. In addition, an individual's essential liberty would be deprived because any person who was mad, upset, jealous or plain mean would have the power to call 911 and launch a false complaint that would then be the sole reason for a stop and seizure.

A. Identified citizen-informants should still be subject to an objective standard of reliability.

It is well established that "a police officer may detain and question an individual when the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity." *State v.Markland,* 2005 UT 26, ¶10, 112 P.3d 507. In order to satisfy the reasonable suspicion standard, an officer must only have "some minimal level of objective justification for making the stop. That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence." *Alabama v. White*, 496 U.S. 325 (1990). Courts accordingly look to the "totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu,* 534 U.S. 266 (2002).

In *State v. Norris*, 2001 UT 104 ¶ 18, 48 P.3d 872, this Court held that when evaluating tips, "reliability and veracity are generally assumed" when the tip comes from "a citizen who receives nothing from the police" in exchange for the information. *Id.* There are generally two categories of tips that do not enjoy the presumption of reliability. First, courts do not presume that a tip is reliable when it

comes from a police informant who has gained the "information through criminal activity" or who is "motivated by pecuniary gain." *State v. McArthur,* 200 UT App 23, ¶ 31. Second, tips that come from anonymous sources are subjected to further analysis, and must therefore be supported by particular indicia of reliability in order to support reasonable suspicion. *Florida v. J.L.*, 529 U.S. 266 (2000). Both of these exceptions arise from a probability of ulterior motives for the call. It is precisely this probability of ulterior motive that arose in the present case with an angry, vindictive caller who used abusive names toward the Defendant.

In *State v. Kohl,* 2000 UT 12, ¶ 14, 999 P.2d 7, the Court concluded that the dispatch was based on articulable facts to justify the stop through the informant's tip. *Id.* The Court stated, "all the State must introduce is evidence showing the informant's tip was reliable, provided sufficient detail of criminal activity, and could be corroborated by police." *Id.*

In *Kohl*, the informant's tip was reliable because the informant provided information about whom to stop, including the make and color of the vehicles and the number of suspects, but also indicated why the stop was to be made. *See State v. Case,* 884 P.2d 1274,1278 (Utah App. 1994) ("Merely providing descriptive information to an officer about *whom* to stop, by itself, is not enough to justify the stop if there are no articulable facts pointed to which establish *why* a stop was to be made."). In addition, in *Kohl*, more importantly, the police personally confirmed

the dispatcher's report of the informant's tip first by direct contact with French, the victim, and thereafter by finding several males and vehicles matching French's description, including the driver of the green truck, who confirmed critical elements of the description given in person by French to officers. The court held that the officers' stop was supported by reasonable suspicion and affirmed the trial court's ruling. *Id.*

The present case can be distinguished from *Kohl*. In *Kohl*, the informant gave information not only regarding the defendants and their vehicle description, but also gave a reason why a stop should be made. Here, Annalee never made a statement that she thought the Defendant was drunk or that he should be stopped for being intoxicated. She further indicated that he had never assaulted her. The court in *State v. Case,* 884 P.2d at 1278 (UT. App. 1994) explicitly said that mere description is not enough. Annalee gave nothing more than a description. No further facts were asked to confirm whether Defendant was intoxicated or not. This type of information should be considered unreliable.

The U.S. Supreme Court in *Devenpeck v. Alford*, 543 U.S. 146 (2004), stated that "an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probably cause. *Id.* see also *Whren v. United States*, 517 U.S. 806 (1996) and *Arkansas v. Sullivan*, 532 U.S. 769 (2001). The same court stated that "[E]venhanded law enforcement is best achieved by the

application of objective standards of conduct, rather than standards that depend upon the subjective state of the officer." *Id.* see *Horton v. California* 496 U.S. 128 (1990)

Utah has similarly followed that same standard. In *State v. Dorsey,* 731 P.2d 1085, 1088 (Utah,1986) this Court held:

> The validity of the probable cause determination is made from the objective standpoint of a "prudent, reasonable, cautious police officer ... guided by his experience and training." (citing *United States v. Davis,* 458 F.2d 819, 821 (D.C.Cir.1972))

The U.S. Supreme Court as well as Utah courts have made it clear that an arresting officer's state of mind (except for facts that he knows) is irrelevant to the existence of probable cause. *Id.* Meaning, that an officer's subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.

In the present case, Sergeant Ledford had no objective articulable reason for stopping the Defendant. The reasoning behind stopping the Defendant was not objective, it was subjective. Defendant's girlfriend called 911, stated that no crime had actually occurred, stated that the Defendant may have had something to drink, but does not specify how much, how long ago, or how much the Defendant weighed. The information received from the 911 call does not substantiate any specific crime. Next, Sergeant Ledford states that Defendant was driving

cautiously and that no traffic laws were being violated. This type of driving is what society encourages. Then with no objective reasoning, relying on only his hunch, Sergeant Ledford stopped the Defendant. This is a violation of Defendant's rights and contrary to the objective standard rule applied, upheld nationally and locally.

Utah courts have also held that a relationship of the informant to the defendant also plays a role in the reliability of the tip. In *Salt Lake City v. Bench*, 2008 UT App 30, ¶ 16, 177 P.3d 655, *Certiorari Denied* by *Salt Lake City v. Bench*, 199 P.3d 367 (Utah Jul 11, 2008) the court held that an ex-wife's "veracity was questionable," even though "nothing...suggested that she actually harbored any ill will" toward her ex-husband. *Id.*

In *Bench* (*Id.* at ¶ 16), the Court made it clear that certain citizen-informants are less reliable. In *Bench*, his ex-wife was an identified citizen-informant. The city argued that she was a reliable source of information. Because a citizen-informant "volunteer[s] information out of concern for the community and not for personal benefit," *Id.* (citation and internal quotation marks omitted), and because "the informant is exposed to possible criminal and civil prosecution if the report is false," *Id.* (citation and internal quotation marks omitted), a tip from an identified citizen-informant is generally considered "highly reliable." *City of St. George v. Carter,* 945 P.2d 165, 169 (Utah.App.1997), *cert. denied, St. George v. Carter*, 953 P.2d 449 (Utah 1998). *See Kaysville City v. Mulcahy,* 943 P.2d 231 (Utah

App.,1997) ("An identified 'citizen-informant' is high on the reliability scale[.]") (citation omitted).

In *Bench*, the court held:

> [T]here are circumstances where a citizen-informant's veracity may properly be called into question. *See, e.g., State v. Anderson,* 910 P.2d 1229, 1233 (Utah 1996) ("[P]olice expressed some question of [an informant]'s veracity due to a bias she may have harbored toward her ex-paramour."); *State v. White,* 856 P.2d 656, 662 (Utah Ct.App.1993) (recognizing that ex-wife's allegations that defendant was high on cocaine and had been involved in a domestic disturbance earlier in the day were of "questionable reliability"); *United States v. Phillips,* 727 F.2d 392, 393-94, 398 (5th Cir.1984) (noting that evidence informant was defendant's estranged wife, who had recently quarreled with and left her husband, "may have cast doubt on her trustworthiness"); *United States v. Hodges,* 705 F.2d 106, 108 (4th Cir.1983) (discussing veracity of defendant's former live-in girlfriend who perhaps "harbored ill will toward" him); *Louisiana v. Morris,* 444 So.2d 1200, 1204 (La.1984) (discussing veracity of informant who, involved in a custody dispute with his wife, may have wanted to give "a false report to embarrass or inconvenience" her); *Minnesota v. Lindquist,* 295 Minn. 398, 205 N.W.2d 333, 335 (1973) ("[A] prior relationship with a suspect might give an informer motive to lie or exaggerate."); *Montana v. Olson,* 314 Mont. 402, 66 P.3d 297, 303 (2003) (observing that evidence of a "strained relationship" between informant and his defendant wife, who had separated from him, may indicate that the informant had mixed motives). Such a concern is surely presented here, given that the citizen-informant was Bench's ex-wife and that malice or ill will is a typical-albeit not inevitable-product of divorce." *Salt Lake City v. Bench*, 2008 UT App 30, ¶ 15, 177 P.3d 655, *Certiorari Denied* by *Salt Lake City v. Bench*, 199 P.3d 367 (Utah Jul 11, 2008)

The present case is similar to *Bench*. Here Annalee was upset with the Defendant and even told the dispatcher "I don't even give a s---, I just want him out." R. 96:2. Annalee was excited and angered. The dispatcher then attempted to calm Annalee down, telling her to "take a couple of deep breaths." R. 96: 2. These types of words and expressions require that a dispatcher get more information to make the informant more reliable and support the claims made. The informant is not completely unreliable, but the dispatcher and officer are required to get further corroborating evidence to justify a stop.

The *Bench* court went on to say that had the ex-wife provided more detail, which Bench's ex-wife was in a position to provide, that would have gone a long way in satisfying the concerns implicated by her questionable reliability as his ex-wife.

Likewise, Annalee McCain was in a position to tell the dispatcher more information. Annalee could have explained the amount of alcohol the Defendant had been drinking, when he had been drinking, his weight and other information that would have made her a more reliable informant and provided objective information to justify the stop. That additional inquiry was simply not made.

The State wants this Court to believe that allowing the *Roybal* decision and the *Bench* decision to stand, will place family members and spouses in the same class as criminals and anonymous callers in regards to informants who do not

enjoy the presumption of reliability. (States brief pg 13,) That fear does not logically follow the Court's decision in *Roybal*. If this Court is to follow its long-standing policy of applying an objective standard to an officer's reasons for a stop and seizure, it needs to be applied uniformly across the board. Both the State and the Amicus brief seem to ask this Court to allow a dispatcher to disregard the context in which a particular 911 complaint is made if it is from a woman caller in a domestic situation. Carving out an exception for a domestic call undermines the very foundation of the objective standard this Court has set forth. Furthermore, requiring further information from a 911 caller does not unreasonably deter the calling of 911 by bona fide victims. In fact, reason would dictate that requesting more information by the dispatcher in a 911 call would reassure a victim of the police's sincerity in following up on the allegations and protecting the caller.

The State cites the case of *Massachusetts v. Upton,* 466 U.S. 727 (1984), in which a defendant's girlfriend called the police and told them about stolen goods. *Id* at 729. The girlfriend had admitted she they were broken up and wanted defendant to burn. *Id.* The Supreme Court held this call supported the search warrant saying the recent breakup provided motive for furnishing the information. *Id.* at 734. The Court further upheld the search and the tip of the informant because it was supported by other corroborating evidence and much detail by the ex-girlfriend. *Id.* The lieutenant, in that case, after getting information from the

informant ex-girlfriend, then went to the location of the motor home, began filling out a search warrant and named specific items that had been described by the ex-girlfriend. *Id.* The arrest of the defendant in *Upton* was supported by objective reasons for arrest,(the allegation of stolen goods) while in *Roybal* only the officer and dispatcher's subjective reasons were used.

The State also cites *Illinois v. McArthur,* 531 U.S. 326 (2001). In that case, the Court affirmed a search that was based on a tip from an estranged wife that she had seen illegal drugs inside the home. *Id.* at 329. However, the police in *McArthur* had the opportunity to speak to the estranged wife and make a rough assessment of her reliability. They knew she had had a firsthand opportunity to observe her husband's behavior, in particular with respect to the drugs at issue. The police also had good reason to fear that, unless restrained, McArthur would destroy the drugs before they could return with a warrant.

These cases can be distinguished from *Roybal* for three reasons. First, the girlfriend/ex-wife in the above cases were spoken to by the officers and provided more specific information regarding illegal activity providing an objective reason for arrest. Second, there was a fear of losing evidence if the tips were not relied upon. Third, there were allegations of actual criminal offenses observed by the girlfriend/ex-wife. Here, Annalee never provided the 911 dispatcher with more specific evidence to support her reliability nor did she speak with an officer or

establish credibility by being more specific to the 911 dispatcher. Furthermore, she never articulated any evidence of a criminal offense. Finally, the officer followed Roybal for three blocks and did not observe one traffic violation.

Requiring that the Fourth Amendment be upheld is different than stating in certain circumstances a family or friend providing a tip may need more support to be a credible and reliable informant. Ex-wives, girlfriends, boyfriends, etc. are still encouraged to call and provide tips, but a showing of reliability is necessary before violating an individual's rights to liberty.

The State expresses fear that if a family or close-friend is not deemed a reliable informant, they will be deterred from reporting crimes, especially those of domestic violence or abuse. (Brief Pet. pg. 24). However, requiring corroborating evidence or more detail from an informant does not prohibit nor deter individuals to call and report abuse, rather dispatchers are showing that they are taking the claim more seriously. Recognizing these factors courts in other jurisdiction have held that "a girlfriend's tip was unreliable because it was offered in the midst of a quarrel with defendant." *State v. Williams*, 193 S.W.3d 502 (Tenn. 2006) or that a close personal relationship might create a motive to lie or exaggerate. *State v. Lindquist*, 205 N.W.2d 333 (Minn. 1973).

B. Exigency of 911 calls does not make a source more reliable

In analyzing the sufficiency of the 911 call, if the investigating officer cannot provide independent or corroborating information through his or her own observations, the legality of a stop based on information imparted by another will depend on the sufficiency of the articulable facts known to the individual *originating* the information or bulletin subsequently received and acted upon by the investigating officer. *State v. Case,* 884 P.2d 1274, 1277 -1278 (Utah App.,1994) *See* *1278 *Hensley,* 469 U.S. at 232, 105 S.Ct. at 682; *State v. Seel,* 827 P.2d 954, 960 (Utah App.), *cert. denied,* 836 P.2d 1383 (Utah 1992).

In *United States v. Hensley*, 469 U.S. 221 (1985), the Court stated reasonable suspicion standard "balances the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." *Id.* Thus, allowing 911 calls to be generally considered as reliable. In *United States v. Holloway*, 290 F.3d 1331 (11th Cir. 2002), the Court stated that "such calls are distinctive in that they concern contemporaneous emergency events, not general criminal behavior. Additionally, the exigencies of emergency situations often limit the ability of a caller to convey extraneous details, such as identifying information[3]." *Id.*

[3] Not an issue in the case at bar, since Roybal had clearly left the premises when the 911 call was made.

In *United States v. Holloway*, a police officer had received a dispatch from a 911 operator relaying a report of gunshots and arguing at appellant's address, and then received a second similar dispatch. Upon arrival, nothing at the home dissuaded officers from believing the veracity of the 911 calls, instead the presence of the appellant and his wife on the porch supported the information. The police reasonably believed an emergency situation justified a warrantless search of the home for victims of gunfire. The court held the 911 call and the personal observations of the officers established probable cause to believe a person located at the residence was in danger. (Citing cases such as *Wayne v. United States*, 318 F.2d 205 (D.C. Cir. 1963), holding that people could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process. *Id.*)

However, in *Florida v. J.L.*, 529 U.S. 266 (2000), the Court held that an anonymous tip that a person is carrying a gun is not, without more, sufficient to justify a police officer's stop and frisk of that person. *Id.* In that case the officer's suspicion that J.L. was carrying a weapon arose not from their own observations but solely from a call made from an unknown location by an unknown caller. The Court further held the tip lacked sufficient indicia of reliability to provide reasonable suspicion, and it provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. *Id.*

The present case is almost identical to *Florida v. J.L.* in that the officer's suspicion arose from a 911 call rather than Sergeant Ledford's own observations. The call from Annalee lacked sufficient indicia of reliability as well as lacked an articulated claim of any criminal offense to provide reasonable suspicion that defendant was committing any criminal activity.

Here, the State is arguing that the nature of a 911 call is that of an emergency and should be treated as an "exigent circumstance" requiring more of an assumption of reliability and less confirmation. However, even applying an exigent circumstance rationale, Officer Ledford and the 911 dispatcher had no reason to believe someone would be in danger or that something would be destroyed if they took the time to confirm the reliability of the 911 call. Annalee told the 911 dispatcher that Defendant had "just about" assaulted her, but upon further inquiry that he had not assaulted her, and that the Defendant had left the premise. R. 96:1. The officer and the 911 dispatcher were aware that Annalee was not in immediate danger, and the dispatcher could have asked Annalee for more information regarding the Defendant and his condition. Further, Sergeant Ledford did not observe Defendant driving in a harmful or offensive manner. In fact, Sergeant Ledford testified that Defendant was driving slow and cautiously, but not illegally.

In *State v. Case,* 884 P.2d 1274, 1277 -1278 (Utah App.,1994), the Court stated that the State failed to establish the department's reasonable, articulable suspicion to issue the "possible car prowl" bulletin to officers on duty. Stating "We are left to speculate as to...what did the citizen say? Did the dispatcher interpret the report? If so, in what manner? Did a supervising officer direct that the investigation be made based on a pattern of similar activity in the area? If so, what were the sources of the supervisor's information? Merely providing descriptive information to an officer about *whom* to stop, by itself, is not enough to justify the stop if there are no articulable facts pointed to which establish *why* a stop was to be made.

The Court of Appeals correctly held that Sergeant Ledford did not have a reasonable suspicion that Defendant had committed domestic violence. *Roybal,* 2008 UT App 286. Domestic violence calls present a unique problem for law enforcement. Such disputes are "combustible" by nature and often "present a very real danger of physical injury." *United States v. Lawrence,* 236 F.Supp.2d 953 (D. Neb. 2002) In the instant case, the confrontation was "nonphysical;" and though domestic violence can occur without a physical blow, in the instant case the claims were not supported by way of police observation or victim testimony and therefore no domestic violence occurred.

In *State v. White*, 856 P.2d 656 (UT App. 1993), a telephone call by the defendant's former wife was made to the police department stating the defendant was in the back seat of a brown Oldsmobile, he was accompanied by another woman, he was on parole for armed robbery, he was using cocaine, and he had been involved in domestic disturbance. Based on that information, Officer Yurgelon responded to the call. Officer Yurgelon testified that he stopped the defendant because he had suspicion defendant had violated his parole and had been involved in a domestic disturbance. Officer Yurgelon stated that defendant gave "no indication that he was armed" and defendant complied to the officers request to separate himself from the female. Even so, Officer Yurgelon proceeded to frisk the defendant. Upon a frisk, he found a syringe.

The Court determining whether a report of domestic violence would automatically place a frisk of the suspect within the ambit of Utah's frisk statute, Utah Code Ann. §77-7-16, the Court concluded that any "immediate concern the officers might have felt for the defendant's female companion should have diminished when defendant separated himself from this companion by following police instructions and getting out of the car. At that point, any residual concern the officers harbored would have been completely dispelled by asking the companion if she were in distress and inquiring whether she were, in fact, involved in the earlier incident." *Id.* The *White* court held that an automatic frisk was not

appropriate under the circumstances and that the officer lacked a reasonable suspicion that criminal activity might be afoot.

In *U.S. v. Sikut*, 488 F.Supp.2d 291, 307 -308 (W.D.N.Y.,2007), the Second Circuit has recognized the "combustible nature of domestic disputes," which provides "great latitude to an officer's belief that warrantless entry was justified by exigent circumstances when the officer had substantial reason to believe that one of the parties to the dispute was in danger." However, once the officers investigate,

> ... under the Fourth Amendment, the officers' authority to remain on the premises without a warrant ended when they determined no one in the apartment required assistance, and they realized, or objectively should have realized, they had no reasonable grounds to suspect Sikut was either a burglar or a trespasser...(*U.S. v. Sikut* 488 F.Supp.2d 291, 313 (W.D.N.Y.,2007))

Furthermore, courts have held that domestic violence situations are not *per se* exigent, *United States v. Najar,* 451 F.3d 710, 719 (10th Cir.2006), *cert. denied,* --- U.S. ----, 127 S.Ct. 542, 166 L.Ed.2d 401 (2006).

Similarly, Sergeant Ledford's concern for Annalee should have been dispelled when he determined that Roybal had left Annalee's premise and was no longer near her. This fact was cemented once Sergeant Ledford discovered Roybal 1.5 miles from the residence. Further, when Annalee called 911, she stated that Roybal "just about" assaulted her. She made no further statements that would indicate he had tried and missed, nor did she make statements that she was in

immediate fear or danger. Instead she told the 911 dispatcher to "get over here quick" and that "I don't even give a s---, I just want him out." R. 96:2. These types of statements expressed more anger than fear, and the 911 dispatcher even told Annalee to calm down by "taking deep breaths.". R. 96:2. Here, there was little risk domestic violence had happened or was about to happen. Sergeant Ledford did nothing to provide himself of objectively reasonable facts that would support a domestic violence claim.

The 911 call was placed by an intoxicated and upset girlfriend who was not in "immediate and deadly threat of harm." Additionally, the information provided by the 911 caller in the instant case was not unambiguously indicative of a recent domestic dispute involving personal violence. Rather, the 911 caller stated that Defendant "just about" committed some action, and upon inquiry that he had in fact not committed an assault. R. 97:2.

In an article featured on MSNBC (Alex Johnson), 911 that "as many as 45 percent of the more than 8 million cell phone calls to 911 each year are for non-emergencies, officials said; in Sacramento, it could be as high as 80 percent. Those calls block the lines for callers who really need urgent help." With statistics and the frequency of 911 calls for emergencies, non-emergencies, and pranks, it is essential for 911 dispatchers to ask enough questions to make a tip or informant coming through a 911 call more reliable.

In a similar Utah study, a 2005 report issued by Governor Huntsman on Domestic Violence, statistics showed that of over 6,000 supported allegations of domestic abuse (child), only 60% of those resulted in actual identifiable acts of domestic violence. (Governor's report of 2007 and of 2005.) This statistic and many others indicate that calls are made and police respond to a number of non-threatening calls. Requiring more information from informants will not result in a policy break down of the seriousness of domestic violence, rather will encourage individuals who need assistance to call and will discourage individuals who may call just out of spite knowing they have no supporting evidence. Objective reasons for making an arrest are fundamental to the proper functioning of the criminal justice system and society.

It is necessary that in justifying a particular intrusion, the 911 dispatcher should ask callers for more information relating to the allegations when the situation requires and time permits. Police officers must be able to point to specific and articulable facts which, taken together with rational inference from those facts, reasonably warrant that intrusion. Such a rule saves valuable police resources as well as preserves the constitutional rights of the citizens. The fact that the tip is from a 911 call does not make it inherently reliable. This Court should accordingly sustain the Court of Appeals' conclusion that Sergeant Ledford did not have reasonable suspicion to support the stop.

ISSUE II:

THE COURT OF APPEALS CORRECTLY ANALYZED THIS CASE AND LOOKED AT THE TOTALITY OF THE CIRCUMSTANCES IN DECIDING THAT OFFICER LEDFORD DID NOT HAVE REASONABLE SUSPICION THAT DEFENDANT WAS DRIVING UNDER THE INFLUENCE.

"[I]t is settled law that 'a police officer may detain and question an individual when the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity.' " *State v. Markland,* 2005 UT 26, ¶ 10, 112 P.3d 507. Under the reasonable suspicion standard, "the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *United States v. Arvizu,* 534 U.S. 266, 274, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002). When determining whether police officers had a reasonable and articulable suspicion, courts may not use a "divide-and-conquer analysis." *Terry v. Ohio,* 392 U.S. 1, 22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In other words, courts cannot evaluate individual facts in isolation to determine whether each fact has an innocent explanation. *United States v. Arvizu,* 534 U.S. 266, 274, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002). Rather courts must look to the "totality of the circumstances" to determine whether, taken together, the facts warranted further investigation by the police officer. *Id.* This analysis cuts both ways. An officer cannot look at one weak allegation of questionable criminal conduct and throw out

other indications of law-abiding behavior that tend to discount or raise suspicions of the weak allegation.

An officer's suspicion is reasonable if it is supported by specific and articulable facts as well as any rational inferences drawn from those facts. *See Terry,* 392 U.S. at 21, 88 S.Ct. 1868. However, an "inchoate and unparticularized suspicion or 'hunch,' " is insufficient to establish reasonable suspicion. *State v. Alverez,* 147 P.3d 425, 432 (Utah,2006) An arresting officer's state of mind is irrelevant to the existence of probable cause.

The State in the instant case claims that the Court of Appeals wrongfully applied and used a divide-and-conquer analysis. The State cites the case *Alverez* in which this Court stressed that the Constitution "does not prevent police from using tips without any indicia of reliability if, in addition to such tips, the officer's own observations give the officer reasonable suspicion of illegal activity. *Id.* The State further cites this Court in *State v. Markland*, 2005 UT 26, 112 P.3d 507, held officers "should not have been expected or required to completely ignore the suspicious backdrop provided by the dispatch report with investigation." *Id.*

The Utah Court of Appeals and the United States Supreme Court have held that when applying the totality of the circumstances analysis, a police officer may, in certain circumstances, rely on information received from another; however, "the legality of a stop based on information imparted by another will depend on the

sufficiency of the articulable facts known to the individual originating the information." *State v. Case,* 884 P.2d 1274, 1277 (Utah Ct.App.1994); In other words, the tip must bear some indicia of reliability. *Florida v. J.L.,* 529 U.S. 266, 271, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000). Further, in *Devenpeck v. Alford,* 543 U.S. 146 (2004), the U.S. Supreme Court states that "our cases make clear that an arresting officer's state of mind (except facts that he knows) is irrelevant to the existence of probable cause." *Id.* Using a totality of the circumstances analysis, it is still important to examine the reliability of the informant's tip, a 911 call or other information to make sure it satisfies an objective reasonable suspicion standard. *Id.*

In *State v. Case,* the officers received two tips. Officer Wahlin described one tip as his "ha[ving] heard there was dealings in this area." The other tip, about defendant's vehicle, came from the police department's narcotics division. The record does not disclose whether the narcotics division was able to provide any background information about the origin or trustworthiness of its report. Because the origin of the tips relied on by the officers is unknown, neither tip bears any external indicia of reliability, which is troubling. Indeed, the State has conceded that the tips alone were insufficient to create a reasonable suspicion.

The current case is almost identical to *State v. Case*. Here, Sergeant Ledford relied on a tip that did not bear external indicia of reliability, and his observations of the defendant "slowing and making right turns" is not sufficient by itself to

justify a stop. To the contrary, the following and critical examination of Roybal's driving for almost four (4) blocks with no traffic violation points to the unreliability of the questionable tip. Applying a totality of the circumstances analysis, the information given to Sergeant Ledford and his own observations falls short of establishing an objective reasonable suspicion for stopping the Defendant for driving while intoxicated. No specific details were given to Sergeant Ledford about the amount of alcohol that had been consumed, in fact the only information given to the 911 dispatcher was that the Defendant "had been drinking," when the Defendant drank, what type of alcohol he consumed or the amount was never given or mentioned by Annalee.

In addition to the tip being unreliable, Sergeant Ledford's own observations were insufficient to warrant a stop. Sergeant Ledford stated he observed Defendant driving slowly and trying to stay behind the officer and made three right turns. However, this type of behavior could be consistent with other situations such as an individual being lost in a neighborhood trying to find an address, old age, public perception of fear of police officers and traffic tickets or more likely, just cautious and proper driving, the type that should be encouraged, not criticized. Defendant was not doing anything illegal; and therefore relying on Sergeant Ledford's experience and observations alone, did not support the stop.

In *State v. Dorsey* 731 P.2d 1085, 1087 (Utah,1986) this Court held:

> The probable cause requirement is subject to a narrow exception for stops of moving vehicles where police officers have an articulable suspicion that the automobile's occupants are "involved in criminal activity.

It is important to make it a reasoned and logical examination of the facts available to Sergeant Ledford in determining whether or not there was reasonable articulable suspicion that the Defendant was engaged in criminal activity. The Defendant agrees that utilizing a totality of the circumstances modality in making this assessment is necessary.

Utah as well as the U.S. Supreme Court have stated that "[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Id.* "In justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inference from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1. "It is necessary that the facts available to the officer would cause a person of "reasonable caution" to believe that the intrusion was necessary." *Id.* at 21.

Courts have further held that tips can still be considered, along with other factors, in a totality of the circumstances analysis. In *Florida v. J.L.*, 529 U.S. 266, 1278 *Hensley,* 469 U.S. at 232, 105 S.Ct. at 682. the United States Supreme Court affirmed the decision of a Florida state court to suppress evidence that was

obtained from a juvenile defendant where the police officers' suspicions "arose not from any observations of their own but solely from a call made from an unknown location by an unknown caller." *Id.* at 270. The Court further stated that it does not prevent police officers from using tips without any indicia of reliability if, in addition to such tips, the officer's own observations give the officer a reasonable suspicion of illegal activity. *Id.*

This Court in *State v. Alverez,* 2006 UT , 147 P.3d 425, held that where two officers observed suspicious objects in the defendant's car, along with their inference the officers drew as a result of their experience, strengthen the reasonableness of the officer's suspicion when considered in the context of the tips. Additionally, this Court held that notwithstanding the conclusion that there was reasonable suspicion, they note this was a close case. The totality of the facts barely meets the threshold of reasonable and articulable suspicion. "We thus emphasize that it is only because of the sum of all the available facts that we affirm the Court of Appeals' decision. The absence of any one of the facts could well have dictated a different conclusion. We also point out that the officers in this case could have done many things to shore up their suspicions about Defendant before detaining him. For example, they could have verified the tips they had received, followed Defendant from the condominium complex to do further surveillance of his activities, inquired as to what apartment he had visited, and asked whether he

was the owner of the vehicle. Any of these would likely have provided more substantial probable cause to justify obtaining a warrant for Defendant's person. This decision is not intended to give police officers permission to "seize now, ask questions later" without first conducting an adequate investigation." *Id.*

Applying this objective totality of circumstances analysis to the case at bar, it is clear that Sergeant Ledford did not have reasonable suspicion to justify a constitutionally permissible stop and seizure. As previously discussed, the 911 call did not establish that a criminal violation had occurred. At best we have an upset girlfriend who wants the Defendant harassed. There were no allegations of criminal activity. Sergeant Ledford testified that he, after receiving the dispatch notice, located the Defendant's car. He followed the vehicle for over three blocks and a total of three turns specifically looking for <u>any</u> traffic violation, and he observed none. He was only able to testify that the Defendant was driving slowly and committed no traffic offenses.

Several conflicts in Sergeant Ledford's testimony cause concern. First, Sergeant Ledford testified that he was traveling eastbound on 30th Street heading toward Annalee's house. A review of the Google map of that area would indicate that a driver traveling eastbound on 30th Street would be traveling away from the residence. Sergeant Ledford's testimony changed from the preliminary hearing where he testified the Defendant was driving at approximately 25 miles an hour to

the suppression hearing, where he testified the defendant was driving 5 miles an hour. There is absolutely no explanation for this 500% discrepancy in his estimating abilities. The State, in attempting to support the stop, cites a NHTSA study that claims there is a good chance the driver is DWI if a driver is driving 10+ mph under the limit. (App. Brief pg. 42). Where there is a 500% discrepancy in Sergeant Ledford's estimating abilities, it seems incredible that is the State would ask this Court to rely upon those estimations of speed to justify a seizure. Furthermore, what the State fails to mention is that the defendant was first observed at a stop sign and then drove for a distance of only one block before making a right hand turn. This was repeated on three consecutive blocks and three consecutive stops and right-hand turns. It is highly doubtful that anyone would reach a posted speed limit of 35 mph or 40 mph starting from a dead stop, turning right, and then slowing in anticipation of another right-hand turn. If the Defendant had reached 40 mph in that situation he probably would have been cited for reckless driving.

Given the totality of those facts, a reasonable, objective person would not have believed a stop to be warranted. Sergeant Ledford did not have reasonable suspicion to stop Defendant because no violation of the law was occurring and the Appellate Court properly analyzed the information and tips under the totality of the circumstances and correctly concluded the stop was illegal.

CONCLUSION

The Defendant believes that an objective review of all of the information available or discerned by Sergeant Ledford simply does not support a reasonable suspicion that the Defendant had committed a crime of domestic violence. Furthermore, an objective review of the information given to or discerned by Sergeant Ledford does not support a reasonable suspicion that the Defendant was driving under the influence of alcohol. The Defendant therefore respectfully requests this Court suppress the evidence obtained by an unconstitutional seizure and affirm the Court of Appeals decision.

Respectfully submitted April 13, 2009.

RANDALL W. RICHARDS
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing Brief of Appellant to Assistant Attorney General, Attorney for the Plaintiff, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0180, postage prepaid this 13 day of ~~March~~ April 2007.

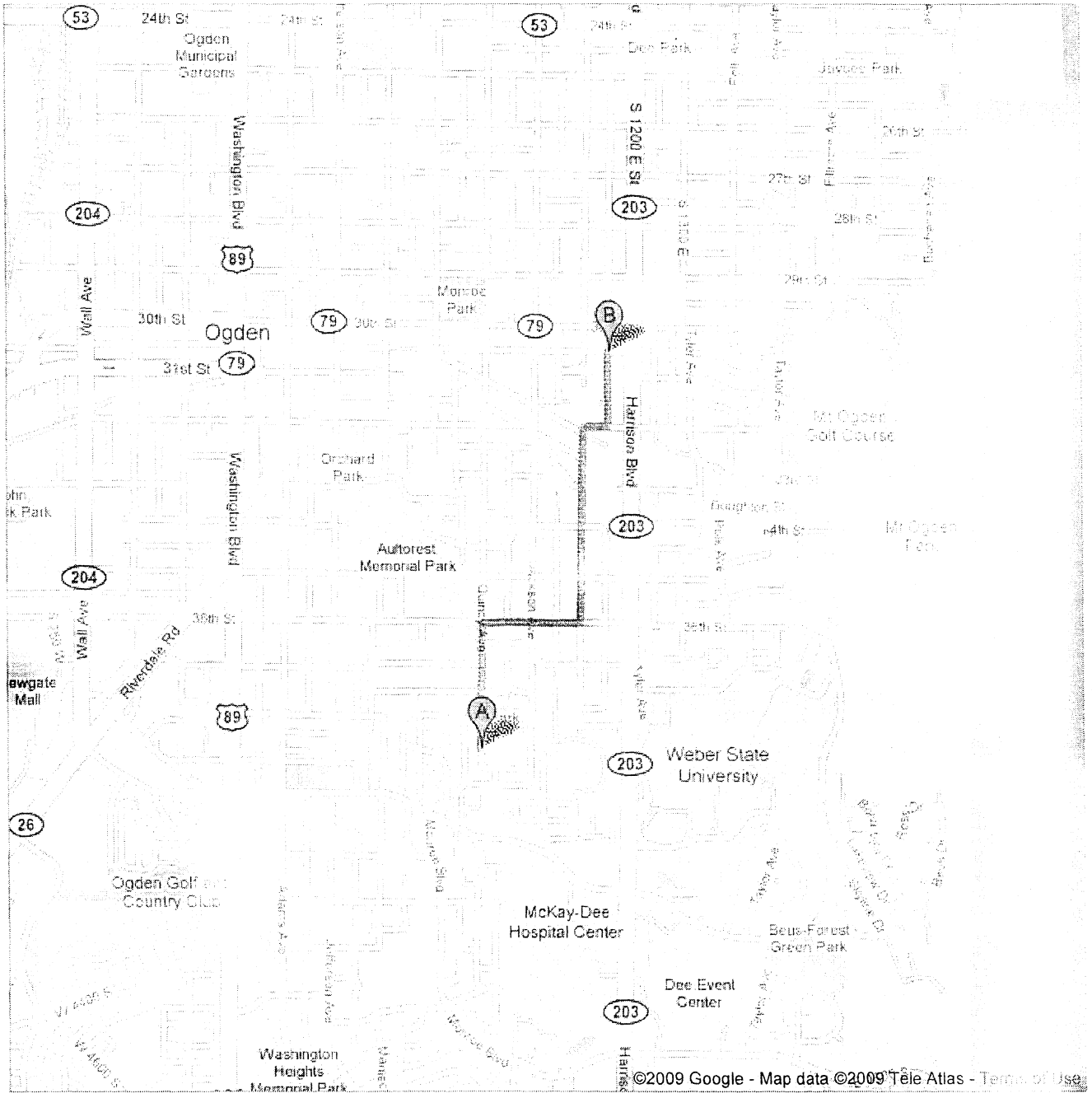
RANDALL W. RICHARDS
Attorney at Law

ADDENDUM A

Google Maps

Directions to 1150 Patterson St, Ogden, Weber, Utah 84403

1.5 mi – about **5 mins**



Google Maps

Directions to 1150 Patterson St, Ogden, Weber, Utah 84403
1.5 mi – about **5 mins**

3865 Quincy Ave, Ogden, UT 84403

1.	Head **north** on **900 E/Quincy Ave** toward **3800 S/3875 S/Grandview Dr** Continue to follow Quincy Ave About 1 min	go 0.4 mi total 0.4 mi
 2.	Turn **right** at 36th St About 1 min	go 0.3 mi total 0.6 mi
 3.	Turn **left** at **Van Buren Ave** About 2 mins	go 0.5 mi total 1.2 mi
4.	Continue on **32nd St**	go 440 ft total 1.3 mi
 5.	Turn **left** at **Brinker Ave** About 1 min	go 0.2 mi total 1.5 mi

1150 Patterson St, Ogden, Weber, Utah 84403

ADDENDUM B

IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Jose Baltarcar Roybal, Defendant and Appellant.	OPINION (For Official Publication) Case No. 20060911-CA F I L E D (July 25, 2008) 2008 UT App 286

Second District, Ogden Department, 051904214
The Honorable Parley R. Baldwin

Attorneys: Randall W. Richards, Ogden, for Appellant
Mark L. Shurtleff and Ryan D. Tenney, Salt Lake City, for Appellee

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Before Judges Thorne, Davis, and Orme.

ORME, Judge:

¶1 Defendant Jose Baltarcar Roybal appeals the trial court's denial of his motion to suppress evidence. We conclude that the appeal is well-taken, reverse the denial of the motion to suppress, and remand for a new trial.

BACKGROUND[1]

¶2 Roybal's live-in girlfriend called 911 and reported a domestic dispute. She identified herself and stated that Roybal

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1. The trial court made some oral factual findings and conclusions of law after the April 18, 2006, evidentiary hearing, but it never entered formal factual findings and conclusions of law. Our recitation of the facts, therefore, is based on the trial court's oral findings and on evidence presented at the evidentiary hearing that supports those findings.

We have jurisdiction to consider the suppression issue because the trial court's sentence of Roybal "constitutes a final order from which he may appeal." State v. Norris, 2002 UT App 305, ¶ 8, 57 P.3d 238 (determining that the Utah Court of Appeals had jurisdiction to consider an appeal from the trial court's denial of the defendant's motion to withdraw a guilty plea, even though the trial court only orally denied the motion, because the "sentence constitute[d] a final order") (citation and internal quotation marks omitted).

had "[j]ust about" assaulted her and that she wanted him out of the house. The dispatch operator asked her if Roybal had been drinking, and she replied that they both had been drinking. She gave no additional information about the quantity or type of alcohol Roybal had consumed or the time period during which he had been drinking. She then told the dispatch operator that Roybal was leaving in a white 1985 GMC van. She also gave the dispatcher Roybal's name, stated that he was fifty-nine and Hispanic, identified the first three letters of the van's license plate, and indicated that he was heading south on Quincy Avenue.

¶3 The dispatch center informed Sergeant Ledford of the call, stating that the suspect was "very intoxicated," and Sergeant Ledford started heading toward the house. En route, he saw the described van.[2] He testified that the driver was driving in a manner that indicated he might be intoxicated--he was driving with "slow deliberate movements" and seemed to be trying to avoid Sergeant Ledford. Sergeant Ledford further testified that he followed Roybal long enough to ascertain he was driving in a circular pattern, near the 911 caller's residence. The trial court found that it "was not a circle pattern, but a right-turn pattern." Nonetheless, this driving pattern concerned Sergeant Ledford because, in his experience, people leaving the scene after domestic disputes often drive around the area, waiting to see if the police are going to arrive, before returning to the scene.

¶4 After following Roybal for a few blocks, Sergeant Ledford noticed that Roybal was driving below the speed limit, but Sergeant Ledford did not observe any traffic violations.[3] Sergeant Ledford pulled Roybal over. Sergeant Ledford later testified that he "smell[ed] the odor of alcohol coming from inside the van." Once Roybal exited the van, Sergeant Ledford smelled alcohol on Roybal's breath. Roybal admitted that he had been drinking, and he failed a field sobriety test. Sergeant Ledford arrested him for driving under the influence of alcohol. This prosecution followed.

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2. Sergeant Ledford also testified that after he stopped the van, he confirmed that the driver matched the physical description given.

3. Generally, a person is considered to commit a traffic violation for driving too slowly only if he or she "impede[s] or block[s] the normal and reasonable movement of traffic" without a legitimate reason for doing so. Utah Code Ann. § 41-6a-605(1) (2005). The trial court determined that while Roybal was driving slowly, he was not driving in an improper manner or violating the law.

¶5 Roybal moved to "[s]uppress any and all [e]vidence in the . . . case" because "there [was] insufficient reasonable articulable suspicion . . . to initiate [the] motor vehicle stop." A couple of days after the evidentiary hearing, the trial court orally denied Roybal's motion to suppress, concluding that the girlfriend's statement that Roybal had been drinking provided justification for the traffic stop. Roybal later entered a no-contest plea to driving under the influence of alcohol, see Utah Code Ann. § 41-6a-502(1) (2005), a third-degree felony in this case, see id. § 41-6a-503(2)(b) (Supp. 2007), reserving his right to appeal the trial court's denial of his motion to suppress. He now appeals the trial court's suppression decision.

ISSUE AND STANDARDS OF REVIEW

¶6 Roybal argues that the trial court erred in denying his motion to suppress because Sergeant Ledford violated his Fourth Amendment rights by initiating the traffic stop without reasonable suspicion that Roybal was committing a crime. In an appeal from a trial court's denial of a motion to suppress evidence, "we review the trial court's factual findings for clear error and we review its conclusions of law for correctness." State v. Tiedemann, 2007 UT 49, ¶ 11, 162 P.3d 1106. "In search and seizure cases, no deference is granted to . . . the [trial] court regarding the application of law to underlying factual findings." State v. Alverez, 2006 UT 61, ¶ 8, 147 P.3d 425. See State v. Brake, 2004 UT 95, ¶ 15, 103 P.3d 699 ("We abandon the standard which extended 'some deference' to the application of law to the underlying factual findings in search and seizure cases in favor of non-deferential review.").

ANALYSIS

¶7 Roybal contends that the 911 call did not provide reasonable suspicion for the traffic stop because the call was "received from a citizen with unknown reliability" and because "the dispatcher mischaracterized the level of [his] intoxication." The trial court agreed that the dispatch operator mischaracterized the girlfriend's report. This conclusion is inarguable. The girlfriend's statement did not indicate that Roybal was intoxicated at all, much less "very intoxicated." We note, however, that the dispatcher's mischaracterization of the level of intoxication alone does not justify reversal. As long as the dispatch operator had reasonable suspicion at the time of the call that a crime was being committed, or was about to be committed, then the stop, even though effected by a different officer, would be justified. See State v. Case, 884 P.2d 1274,

1276-77 (Utah Ct. App. 1994). That being said, we agree that there was no reasonable, articulable suspicion to justify the traffic stop and therefore reverse.

¶8 "The Fourth Amendment prohibits 'unreasonable searches and seizures' by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." United States v. Arvizu, 534 U.S. 266, 273 (2002) (quoting U.S. Const. amend. IV). See Terry v. Ohio, 392 U.S. 1, 9 (1968). See also Utah Const. art. I, § 14. An investigatory stop of a vehicle is a level two encounter, see State v. Johnson, 805 P.2d 761, 763 (Utah 1991), that is constitutional only if (1) "the officer's initial stop [is] justified" and (2) the officer's "subsequent actions [are] within the scope of the circumstances justifying the stop,"[4] State v. Kohl, 2000 UT 35, ¶ 10, 999 P.2d 7 (citations and internal quotation marks omitted). "A stop is justified only if there is a reasonable suspicion that a person is involved in criminal activity." Id. ¶ 11. An officer "'must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion.'" Id. (quoting Kaysville City v. Mulcahy, 943 P.2d 231, 234 (Utah Ct. App.), cert. denied, 953 P.2d 449 (Utah 1997)). We determine whether an officer had the requisite level of suspicion by evaluating the totality of the facts and circumstances. See id.

¶9 "The specific and articulable facts required to support reasonable suspicion are most frequently based on an investigating officer's own observations and inferences, but under certain circumstances the officer may rely on other sources of information[,]" including "bulletins, or flyers received from other law enforcement sources."[5] State v. Case, 884 P.2d 1274, 1276-77 (Utah Ct. App. 1994). A police officer's traffic stop based solely on such other sources is constitutional as long as "'the police who issued the flyer or bulletin possessed a reasonable suspicion justifying a stop.'" Id. (quoting United States v. Hensley, 469 U.S. 221, 232 (1985)) (emphasis in original).

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4. We only address the first of these two elements, as Roybal does not challenge the officer's actions following the stop.

5. "The term 'flyer[]' . . . has been taken to mean any information intended to prompt investigation that is transmitted through police channels, regardless of method." State v. Case, 884 P.2d 1274, 1277 n.4 (Utah Ct. App. 1994). The dispatch report based on the 911 call in this case readily falls within this definition.

¶10 "Reasonable suspicion . . . is dependent upon both the content of information possessed by police and its degree of reliability. Both factors--quantity and quality--are considered in the 'totality of the circumstances'" analysis. Alabama v. White, 496 U.S. 325, 330 (1990). We first address the reliability of the call, then consider the content of the information the 911 caller gave the dispatch operator, and finally determine whether Sergeant Ledford's observations alone justified the stop.

I. Reliability of the 911 Call

¶11 A court considers several factors when determining the reliability of an informant's tip, including (1) "the type of tip or informant," Kaysville City v. Mulcahy, 943 P.2d 231, 235 (Utah Ct. App.), cert. denied, 953 P.2d 449 (Utah 1997); (2) "whether the informant gave enough detail about the observed criminal activity to support a stop," id. at 236; and (3) "whether the police officer's personal observations confirm the dispatcher's report of the informant's tip," id. See Salt Lake City v. Bench, 2008 UT App 30, ¶ 14, 177 P.3d 655. When a citizen-informant has some kind of personal involvement with the suspect, the information conveyed is considered less reliable because there is a possibility that the citizen is making allegations out of anger, out of jealousy, or for other personal reasons. See id. ¶ 15. This is especially a concern when the informant is a spouse, former spouse, or significant other who recently had an argument or confrontation with the suspect, or who otherwise has a troubled history with the suspect. See id. (citing numerous cases in support of this proposition).

¶12 With regard to the first factor, the 911 caller identified Roybal as her "[s]ignificant other" and acknowledged they had just had an argument. She conceded that Roybal had not assaulted her, although she said he had been about to, and said, even as he was leaving, that she wanted him out of the house. Given these circumstances, and the fact, as found by the trial court, that the caller sounded intoxicated, the dispatch operator should have been somewhat concerned about the reliability of the information received.

¶13 With regard to the second and third reliability factors, the 911 caller did give some details regarding the suspect, the vehicle he was driving, and the direction in which he was traveling. While Sergeant Ledford corroborated some of these details before stopping Roybal, none of these details helped confirm that Roybal was driving while intoxicated--the criminal wrongdoing at issue. See Case, 884 P.2d at 1279 (stating that corroborating details relating to a person's physical description "is not corroboration of criminal activity, only of physical characteristics that by themselves have no relevance to criminal activity"). See also Illinois v. Gates, 462 U.S. 213, 234 (1983)

("[E]ven if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case."); State v. Kohl, 2000 UT 35, ¶ 14, 999 P.2d 7 ("All the State must introduce is evidence showing the informant's tip was reliable, provided sufficient detail of criminal activity, and could be corroborated by police."); State v. Anderson, 701 P.2d 1099, 1100, 1102 (Utah 1985) ("[T]he reliability of the informant's information was bolstered by the detail with which the informant described the proposed [marijuana] enclosure. Finally, there was verification of the significant facts by the officer.") (footnotes omitted). Accordingly, we conclude that the informant's tip to the 911 operator was of questionable reliability.

II. Information Provided in the 911 Call

¶14 Roybal's girlfriend only reported that Roybal had been drinking without indicating the quantity or type of alcohol he consumed or for how long he had been drinking. She also did not provide any information regarding his weight. The trial court, after listening to the 911 recording, determined that the caller sounded intoxicated and that it was reasonable to conclude that both she and Roybal had been drinking. Based on these facts, the court determined that the stop was justified.

¶15 However, the statement that a person has been drinking, by itself--with no other facts regarding the amount of alcohol consumed, the type of beverage consumed, or the period of time over which the person consumed the alcohol, or the person's physical size--does not provide an adequate basis on which to rationally infer that the person has an alcohol level beyond the legally proscribed limit, see Utah Code Ann. § 41-6a-502(1)(a), (c) (2005), or that the person consumed alcohol to the extent that he or she could not safely drive a vehicle, see id. § 41-6a-502(1)(b). See also State v. Markland, 2005 UT 26, ¶ 10, 112 P.3d 507 ("[T]he officer's suspicion must be supported by specific and articulable facts and rational inferences, and cannot be merely an inchoate and unparticularized suspicion or hunch[.]") (citations and internal quotation marks omitted). People frequently drink alcohol without becoming intoxicated. From the information the caller gave, the dispatch operator knew that the suspect was a fifty-nine-year-old Hispanic man but had no information regarding his weight. He could have been three-hundred pounds and consumed only two or three light beers over the course of several hours. If so, two or three light beers would probably not have affected his ability to safely operate a vehicle or caused his blood alcohol level to rise above the proscribed limit. The caller's statements, therefore, provided no information from which the dispatch operator could reasonably infer that Roybal--as opposed to the caller--had consumed alcohol

to the point that he was committing a crime by driving a vehicle. Accordingly, we conclude that the information given by the 911 caller did not provide the dispatch operator with reasonable, articulable suspicion to justify the traffic stop, and it therefore did not provide Sergeant Ledford with such justification. See Salt Lake City v. Bench, 2008 UT App 30, ¶¶ 19-20 & n.4, 177 P.3d 655.

III. Sergeant Ledford's Own Observations

¶16 Finally, we address whether Sergeant Ledford's own observations provided reasonable, articulable suspicion for the stop. Sergeant Ledford did not observe swerving, driving over the center line, or other unsafe driving patterns from which he could have reasonably inferred that Roybal was driving while intoxicated. See State v. Despain, 2007 UT App 367, ¶ 10, 173 P.3d 213. Rather, Sergeant Ledford only observed Roybal driving in a slow, cautious manner. While he testified such driving is consistent with intoxication, we recently discussed in Salt Lake City v. Bench that cautious driving and endeavoring to avoid a police encounter do not establish a reasonable, articulable suspicion that a person is driving while intoxicated. See 2008 UT App 30, ¶¶ 11-13. See also State v. Talbot, 792 P.2d 489, 494 n.11 (Utah Ct. App. 1990). Drivers committing no crimes whatsoever routinely slow down when they see a police car. It is human nature to do so and not suggestive of criminality.

CONCLUSION

¶17 When considering the totality of the circumstances of this case--especially that the tip itself was not reliable, that the content of the information conveyed did not provide reasonable suspicion, and that Sergeant Ledford's own observations provided no information from which he could reasonably suspect that Roybal was driving while intoxicated--we conclude that there was no justification for the traffic stop. The trial court inappropriately denied Roybal's motion to suppress evidence because the dispatch operator, and therefore Sergeant Ledford, did not have reasonable, articulable suspicion that Roybal was committing a crime. The information conveyed in the call by Roybal's live-in girlfriend lacked sufficient reliability because the caller was potentially biased, apparently inebriated, and did not provide meaningful detail regarding the crime that was supposedly being committed. Furthermore, the content of the information provided did not provide any details that indicated Roybal was legally intoxicated and committing a crime when he drove his vehicle. While Sergeant Ledford's own observations did corroborate some ancillary details provided by the caller, none of his observations corroborated the essence of the complaint, i.e., that Roybal was driving while intoxicated. We accordingly

reverse and remand for a new trial or such proceedings as are now appropriate.[6]

Gregory K. Orme, Judge

¶18 I CONCUR:

James Z. Davis, Judge

THORNE, Judge (dissenting):

¶19 I respectfully dissent. I do not agree with the majority that there was no reasonable, articulable suspicion to justify the traffic stop. Rather, I think that the information Roybal's girlfriend conveyed to the 911 dispatcher, together with the inferences that can be drawn therefrom, establish a reasonable suspicion that Roybal was driving while intoxicated sufficient to justify the traffic stop on that basis alone. It is true that the citizen informant in this case identified herself as Roybal's "[s]ignificant other" and acknowledged that they had just had a heated argument, which may render the information conveyed less reliable. Nevertheless, the information conveyed should not be discarded merely on the possibility of bad motive. Courts should evaluate the specific and articulable facts required to support reasonable suspicion in their totality, rather than looking at each fact in isolation. See State v. Worwood, 2007 UT 47, ¶ 23, 164 P.3d 397.

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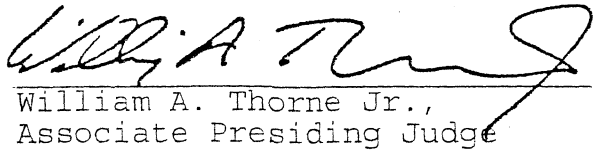
6. The State argues that Sergeant Ledford had an independent reason to stop Roybal because the 911 caller's statements indicated that an assault might have occurred. We disagree. In response to the dispatch operator's first question about whether she had been assaulted, the caller stated that she had "[j]ust about" been assaulted. However, when dispatch asked a second time if she had been assaulted, she clarified that she had not been. The trial court did not base its ruling on this aspect of the call, and the facts conveyed by the caller as to her nonphysical confrontation with Roybal would not support the traffic stop on the alternative basis urged by the State.

¶20 The totality of the information conveyed to the dispatcher, including the girlfriend's intoxicated demeanor and statement that she and Roybal had both been drinking, establishes that the dispatcher had reasonable suspicion that Roybal was driving while intoxicated. Given these circumstances, and after reviewing the audio of the 911 call, the trial judge concluded that the dispatcher could have reasonably inferred that Roybal and his girlfriend had been drinking together, the girlfriend was intoxicated, and Roybal, who had just left the house, was in fact also intoxicated and driving.

¶21 While the girlfriend's unhappy personal relationship with Roybal may, as with the informant in Salt Lake City v. Bench, 2008 UT App 30, 177 P.3d 655, call into question her reliability, see id. ¶¶ 14-16, it does not obviate the facts. Unlike the situation in Bench, the 911 audio demonstrates that Roybal's girlfriend was intoxicated. When coupled with the information that the parties had been drinking together, the dispatcher possessed sufficient information to reasonably infer that Roybal was intoxicated. Although Roybal's girlfriend did not provide the dispatcher with specific information about how much alcohol Roybal had actually consumed, the dispatcher could reasonably infer from the girlfriend's statement that the parties had been drinking together and that the girlfriend had actually witnessed Roybal drinking. Additionally, the girlfriend's intoxicated demeanor would also suggest that Roybal may be intoxicated as well. Thus, even if the girlfriend had a nonobjective motive, the dispatcher could reasonably conclude that the facts and circumstances raised an inference that Roybal was also intoxicated. This is sufficient to establish reasonable suspicion.

¶22 Based on the entirety of the information available to the dispatcher, I would conclude that the dispatcher had reasonable suspicion, despite any reliability issues that may have been present, sufficient to alert officers of an intoxicated driver. I would conclude that the traffic stop was permissible and therefore would affirm the trial court.



William A. Thorne Jr.,
Associate Presiding Judge